Nos. 76-1266 and 76-1304

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In the Supreme Court of the United States

OCTOBER TERM, 1976

NATIONAL ASSOCIATION OF REGIONAL MEDICAL PROGRAMS, INC., ET AL., PETITIONERS

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

JEROME S. WAGSHAL, PETITIONER

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

In No. 76-1266, the opinion of the court of appeals (Pet. App. 46A-58A) has not yet been reported. The opinion of the district court (Pet. App. 22A-41A) is reported at 396 F. Supp. 842.

In No. 76-1304, the opinion of the court of appeals (Pet. App. 26a-36a) is reported at 546 F. 2d 1003. The opinion of the district court (Pet. App. 15a-25a) is reported at 387 F. Supp. 991.

JURISDICTION

In No. 76-1266, the judgment of the court of appeals was entered on December 13, 1976. The petition for a writ of certiorari was filed on March 11, 1977.

In No. 76-1304, the judgment of the court of appeals was entered on November 9, 1976. A timely petition for rehearing was denied on January 13, 1977. The petition for a writ of certiorari was filed on March 18, 1977.

QUESTION PRESENTED

Whether petitioner Wagshal was entitled to an award of attorney's fees from funds appropriated under Title IX of the Public Health Service Act (in No. 76-1266) or under the Community Mental Health Centers Act (in No. 76-1304), notwithstanding the absence of any applicable provision in either statute authorizing such an award.

STATEMENT

A. No. 76-1304.

Petitioner, an attorney, represented the plaintiffs in a successful class action brought on behalf of the National Council of Community Mental Health Centers and 138 community mental health centers to compel the Secretary of Health, Education, and Welfare to obligate $52,050,000 appropriated for expenditure under the Community Mental Health Centers Act, 79 Stat. 427, as amended, 42 U.S.C. 2688 *et seq.* (see Pet. App. 4a-14a). After the conclusion of that litigation on the merits, petitioner commenced ancillary proceedings against the federal respondents and the

individual community mental health centers seeking an award of attorney's fees from the released program funds. The fee sought was in addition to a fee of $13,216.25 that had been paid to petitioner by the National Council under a retainer agreement executed prior to the litigation. The district court declined to enter *in personam* judgments against the community mental health centers, holding that their representation in the ancillary proceeding was inadequate to support jurisdiction (Pet. App. 18a). However, the court awarded petitioner a fee of $65,000 to be paid by the Secretary of Health, Education, and Welfare from unexpended grant funds (Pet. App. 24a). The petitioner was directed to pay $13,216.25 of this amount to the National Council, in order to reimburse the individual class members for the amount each had contributed to the retainer fee (Pet. App. 25a).

The court of appeals affirmed the district court's ruling that it lacked *in personam* jurisdiction to award judgments for attorney's fees against individual members of the plaintiff class (Pet. App. 28a, 35a). However, the court reversed the district court's judgment requiring the Secretary to pay a fee from unexpended grant funds. The court determined that such unexpended funds belonged to the United States rather than to the plaintiff grantees, since the grant funds could be expended only for authorized program purposes and unexpended funds would revert to the public treasury at the end of each fiscal year (Pet. App. 32a). Accordingly, the court held that such a fee award was barred by 28 U.S.C. 2412,[1] which prohibits an award

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[1]The court also determined that the Community Mental Health Centers Act did not authorize the payment of attorney's fees (Pet. App. 32a) and that the Secretary's implementing regulations expressly forbid the use of grant funds for " 'costs * * * incurred in connection with * * * the prosecution of claims against the Government' " (Pet. App. 33a).

of attorney's fees in actions brought against officials of the United States acting in their official capacities except as specifically provided by statute, and by *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (Pet. App. 36a).

B. No. 76-1266.

Petitioner Wagshal represented the plaintiffs in a successful class action brought on behalf of petitioner National Association of Regional Medical Programs (NARMP) and 53 individual Regional Medical Programs (RMP's) to compel the Secretary of Health, Education, and Welfare and other federal officials to obligate approximately $100 million appropriated for expenditure under Title IX of the Public Health Service Act, 79 Stat. 926, as amended, 42 U.S.C. 299 *et seq.* (see Pet. App. 1A-21A). After the conclusion of that litigation on the merits, petitioner Wagshal, as he did in No. 76-1304, commenced ancillary proceedings for an award of attorney's fees against the federal defendants and the plaintiff class.[2] After the fee application was filed, the district court ordered the federal defendants to reserve *pendente lite* up to $200,000 of the appropriated funds released by the litigation to provide a *res* for a potential fee award. The Secretary deposited $180,000 in "direct operations" funds[3] with the court pending the court's final order in the fee proceeding.

[2]NARMP had paid Wagshal a $21,070 fee pursuant to a retainer agreement, and the plaintiff class had volunteered to pay him a further fee of $106,000 from non-grant funds (Pet. 12). In the ancillary proceedings, Wagshal sought still additional monies from federal grant funds (*ibid.*).

[3]These "direct operations" funds were funds that had been set aside, according to HEW's accounting practices, for overhead and operational costs incurred in administering grant programs. See our memorandum in opposition to the related petition in *National Association of Regional Medical Programs, Inc.* v. *Califano*, No. 76-1265.

After a hearing, the court ruled that it had authority to award a fee from the monies deposited in the court's account (Pet. App. 24A-26A) and that it had jurisdiction to enter an *in personam* order against individual members of the plaintiff class for the payment of attorney's fees from either grant or non-grant funds (*id.* at 29A-31A). The court awarded petitioner Wagshal $105,500 and devised a formula for payment whereby each member of the plaintiff class would pay its *pro rata* share of the fee and then be entitled to recoup its payment from the federal monies deposited with the court (*id.* at 42A-45A).[4] The court concluded that "[s]ince unexpended grant funds remain available, it is proper that each RMP's grant be enlarged by the amount of its unexpected legal expense" (Pet. App. 41A). Petitioner Wagshal was required by the terms of the order to refund to petitioner NARMP the amount he had received under the retainer agreement.[5]

The court of appeals reversed the district court's judgment against both the federal defendants and the individual class members. The court held that the fee award from unexpended grant funds contravened 28 U.S.C. 2412 because these funds belonged to the United States (Pet. App. 58A). The court further held that the individual class members could not be charged with payment of the fee from their non-grant funds because they were not adequately

[4]The payment by the individual RMP's was to be made "to the extent possible from funds other than grant funds and to the extent necessary from program income funds * * *" (Pet. App. 43A). However, any member who had insufficient non-grant funds was authorized "to use grant funds to complete payment" (*ibid.*).

[5]The court of appeals subsequently stayed the district court's order insofar as it required the Secretary to pay over the deposited funds to the individual RMP's which now have paid their share of petitioner Wagshal's fee from program funds (Pet. App. 49A-50A).

represented at the fee proceeding (*ibid.*).[6] The court found that the representation was inadequate because petitioner Wagshal in fact was suing the class members while purporting to represent them through NARMP, which in turn stood to recoup the $21,070 paid pursuant to the retainer agreement if the fee application against the individual RMP's succeeded. The court reasoned that since there was no qualified counsel to represent the individual class members in the fee proceeding, due process considerations prevented an *in personam* judgment against them (Pet. App. 58A).

ARGUMENT

In each case, the court of appeals correctly determined that the funds from which the district court ordered payment of attorney's fees were funds that were subject to lapse at the end of the budget period into the United States treasury (Pet. App. 32a, No. 76-1304; Pet. App. 51A, No. 76-1266); thus the award of attorney's fees from those funds was barred by 28 U.S.C. 2412.

Contrary to petitioners' assertion (Pet. 20-23, No. 76-1304; Pet. 27-28, No. 76-1266), the court of appeals did not ignore "three controlling statutes". The statutes that petitioners invoke relate to the Secretary's duty to carry out congressionally authorized mental health programs without impounding appropriated funds. As we note in our memorandum in opposition in *National Association of Regional Medical Programs, Inc.* v. *Califano*, No. 76-1265, p. 3 n. 1, those statutes were enacted simply to insure that the expiration of the fiscal year would not place disputed funds beyond the reach of courts adjudicating impoundment claims. Those statutes do not require or permit such funds to be made available for payment of attorney's fees.

[6] The court did not reach the question of the appropriateness of the amount awarded in view of this reversal of the district court's judgment (Pet. App. 58A).

The appropriated funds therefore remained monies of the United States for purposes of 28 U.S.C. 2412. That statute contains no exception for the "common fund" or "common benefit" doctrine on which petitioners rely. As the court of appeals noted in No. 76-1304, the "common fund" rule invoked by the district court "collides with the express provision of 28 U.S.C. §2412" (Pet. App. 34a). See also Pet. App. 52A, 76-1266. Thus the court of appeals was "constrained to follow the specific statutory prohibition" (Pet. App. 34a, No. 76-1304) and to disallow the fee award.[7]

A. No. 76-1304.

Although the federal respondents have no direct stake in this issue, it is our view that the district court and the court of appeals correctly rejected petitioner's argument that the district court had jurisdiction to enter *in personam* judgments against the individual community mental health centers who were members of the plaintiff class. The district court reasonably held that its power "to render binding *in personam* judgments consistent with due process finds its source in the presence of adequate representatives of the class before the court * * *" (Pet. App. 17a). It concluded that while the class representation during the litigation on the merits was adequate, the

[7] It follows that there is no merit to petitioner's claim in No. 76-1304 (Pet. 23-25) that the court of appeals set aside the district court's "factual findings". The district court erred as a matter of law in holding that it could award attorney's fees to petitioner from grant funds under the "common fund" or "common benefit" theory (Pet. App. 19a-20a), and the court of appeals' reversal was based on its construction of the statute rather than on factual grounds.

Petitioner also argues in No. 76-1304 (Pet. 25-26) that the underlying litigation did not involve a "claim against the Government" within the meaning of HEW regulations that deny attorney's fees in connection with such claims. This argument is frivolous. A claim for release of impounded funds is self-evidently a claim against the government.

application for a fee presented "quite different questions" in that the interests of the National Council were "antagonistic to those of the class on several issues because, among other things, it is seeking return of the fees it has already advanced to [petitioner] as front money" (Pet. App. 18a). Because none of the community mental health centers named as plaintiffs and certified as representatives of the class action appeared in the portion of the case relating to petitioner's fee application, the district court concluded that they were no longer adequately represented. See Rule 23(c)(4)(A), Fed. R. Civ. P.

The court of appeals affirmed the district court's judgment on this issue, noting that adequate representation was a touchstone of due process in class suits and that it was "sorely lacking here" (Pet. App. 35a). The determination of the lower courts that the National Council did not adequately represent the individual class members in the fee application phase of this litigation appears to turn upon the particular facts of this case and does not prevent petitioner Wagshal from seeking recovery of a fee in a separate action. Accordingly, this holding involves no issue of sufficiently general importance to warrant further review.

B. No. 76-1266.

The only respect in which this case differs from No. 76-1304 is that in this case the unnamed class members received notice of petitioner Wagshal's application for attorney's fees (Pet. App. 53A). The district court held that this sufficed to confer *in personam* jurisdiction over the unnamed class members and ordered them to pay petitioner Wagshal's fee from non-grant funds "to the extent possible" but from grant funds to the extent necessary (Pet. App. 42A-43A).

In reversing the district court's ruling on this issue, the court of appeals noted the obvious conflict of interest between the unnamed class members and NARMP, the named plaintiff whose advance to petitioner Wagshal would be reimbursed out of the payment made by the unnamed class members, and concluded that "the only reasonable conclusion which can be drawn is that the class was *not* adequately represented by a named member without conflicting interests in this fee case" (Pet. App. 55A; emphasis in original). The court held that, notwithstanding the notice and opportunity to participate accorded to class members, the "lack of adequate representation of the absentee class members, both here and in the district court, denies them due process of law and prevents the court from assuming personal jurisdiction over the absentee members" (Pet. App. 58A).

While we believe that the court of appeals' decision on this issue was correct, the government has taken the position throughout the fee litigation that it has no interest in the question whether fees are assessed against the unnamed class members individually, so long as such fees are not paid from federal grant funds and payment of the fees from other sources does not impair their operating efficiency (see Pet. App. 23A-24A, 41A n. 3). It appears, moreover, that adequate representation of the absent class members could have been provided in this case by the appointment of separate counsel to represent their interests in the fee proceeding (see Pet. App. 57A n. 31), but petitioners apparently failed to suggest such a procedure to the district court. Furthermore, as in No. 76-1304, it remains open to petitioner Wagshal to seek recovery of a fee in a separate proceeding. In view of these considerations, it seems plain that this case presents no question warranting this Court's review.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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